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Supreme Court of the United States

OCTOBER TERM 1958

No. 394

KINGSLEY INTERNATIONAL PICTURES CORPORATION,

Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Statement of the Case

The four major characters in the film "Lady Chatterley's Lover" are Lady Chatterley, her lover, Mellors, who is a gamekeeper of the estate, the wife of Mellors and the wife's lover. With little left to the imagination, the story presents in great detail the adulterous love affair between Lady Chatterley and Mellors which occurs subsequent to, but apparently not in compliance with, Sir Clifford Chatterley's suggestion to her that in view of his war injury which left him impotent, she have a child by another man to provide him with an heir to his title and estate. As a result of the affair, Lady Chatterley becomes pregnant with Mellors' child and in the final scenes leaves her husband

without a legal divorce or separation to join Mellors as his mistress. To expand this sketchy story there has been added several scenes of intense love making between Lady Chatterley and Mellors and between Mellors' wife and another man, scenes whose dominant purpose is to add to the pornography, immorality and obscenity of the film.

When the film was originally presented to the Motion Picture Division, the Division after review, directed the elimination of three scenes as follows:

> "Reel 2D—Eliminate all views of Mellors and Lady Chatterley in cabin from point where they are seen lying on cot together, in a state of undress to end of sequence."
>
> "Reel 3D—Eliminate all views of Mellors caressing Lady Chatterley's buttock and all views of him unzipping her dress and caressing her bare back. Eliminate following spoken dialogue accompanying these actions:
>
> 'Mais tu es nue * * * Tue es nue sous ta robe, et tu ne le disais pas Qu'est-ceque to as?'
>
> 'But you're nude * * * you're nude under your * * * dress, and you didn't say so * * * What is it?'"

Eliminate accompanying English superimposed titles:

> "'You have nothing on * * *'
> 'And you didn't say so * * *'
> 'What is it?'"
>
> "Reel 4D—Eliminate entire sequence in Mellors' bedroom, showing Lady Chatterley and Mellors in bed, in a state of undress.
>
> Reason: 'Immoral' within the intent of our law." [R. 10]

The petitioner appealed from the determination of the Division in this respect to the Regents. After review of the film by a Committee of the Board of Regents, the Committee rendered its opinion which held that the three sequences specifically referred to by the Division were

immoral under Sections 122-122a and further, that the whole theme of the picture is immoral in that the theme is the presentation of adultery as a desirable, acceptable pattern of behavior and affirmed the determination of the Division.

The Board of Regents thereafter considered the recommendation of the Committee and voted that the determination denying the license for the motion picture be affirmed.

Thereafter, appellant instituted a proceeding in the courts. The Supreme Court of the State of New York, Appellate Division, Third Department annulled the determination of the Regents. The Court of Appeals of the State reversed and confirmed the decision of the Board of Regents.

POINT I

New York State can constitutionally prohibit exhibition of motion pictures which depict scenes of sexual immorality and can prohibit the exhibition of a motion picture which presents sexual immorality as a desirable pattern of behavior.

While the appellant has reiterated in the brief presented in this case the same arguments and cited the same cases as have been presented to this Court in various motion picture cases heretofore, it is important at the outset to understand that the issues in this case are new and have not been determined heretofore. The framework and limits of the issues have, however, been set down by this Court and such issues fall squarely within such framework. In the Burstyn case, *Matter of Burstyn* v. *Wilson*, 343 U. S. 495, two matters were settled:

1. That previous restraint is not unconstitutional under certain circumstances and

2. That the states are at liberty to carry on previous restraint providing a clear and unambiguous law constitutes the basis for the same. It is understood, of course, that the area of censorship must be one where restraint at any stage, before or after, is justified.

So, following these definite conclusions by this Court the Legislature of New York undertook to write a statute which would meet these specifications.

One of the fields where no argument can exist, that some type of supervision can be exercised by a state, is "immorality" and, particularly where such term embraces obscenity.

By unanimous action and with the complete endorsement of all educational and civic organization and with no objection from any source except certain motion picture interests, the term "immorality" was defined. Section 122-a of the Education Law of New York (see Appendix) defines "immorality". The areas are split into various parts, no one part being dependent upon another. The Regents have concluded that this picture contravenes two specific definitions of the term, viz. (1) that it portrays acts of sexual immorality and (2) that it "expressly or impliedly presents such acts (viz. sexual immorality) as desirable, acceptable or proper patterns of behavior." Consequently, the sole and narrow issues before this Court are (1) whether this picture, in fact, contravenes the express statutory standards of immorality as specifically defined and (2) as a corollary whether the standards as defined are sufficiently concrete, clear and unambiguous.

The full definition is not before this Court—only these parts of the definition as cited—and any debate as to

whether other parts of the definition are a proper standard has no bearing in this case.

Governor Dewey, it is to be noted, in signing the measure which enacted section 122-a indicated that the Legislature, representing the people of New York, had this Court's position in the *Burstyn* case clearly in mind and that the enactment of this statute was to bring the Motion Picture Law in dealing with immorality within the criteria set forth in the *Burstyn* case. In his memorandum he stated:

> "* * * Recent Supreme Court decisions have indicated that the term 'immoral' may not be sufficiently definite for constitutional purposes. The primary purpose of this bill is to define 'immoral' and 'tend to corrupt morals' in conformance with the apparent requirements of these cases. It does so by defining them in terms of 'sexual immorality.' The words selected for this definition are based on judicial opinions which have given exhaustive and reasoned treatment to the subject. * * *
>
> "The language of the Supreme Court of the United States, in a recent opinion of this precise problem, should be noted: 'To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. *It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.*' [*Burstyn* v. *Wilson*, 72 S. Ct. 777, 343 U. S. 495, at 502, 96 L. Ed. 1098]. So long as the State has the responsibility for interdicting motion pictures which transgress the bounds of decency, we have the responsibility of furnishing guide lines to the agency charged with enforcing the law. * * * " (Emphasis supplied)

The motion picture division in its original action set forth specifically the scenes which it regarded as representing sexual immorality. This determination of the motion picture division was confirmed by the Board of Regents.

The Board of Regents further concluded that not only were the scenes indicated a portrayal of sexual immorality but also that the whole picture presented adultery as a desirable, acceptable and proper pattern of behavior. The term sexual immorality is and has on numerous occasions been held to be synonymous with the term obscenity,[1] and while the Regents were utilizing the statutory language, it has been their consistent position that within this term the picture or at least those parts of it to which reference is made, is obscene.

This Court has clearly indicated in recent decisions that society is not powerless to protect itself from the degradation of lewd publication. In *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 1 L. Ed. 2d. 1469, 77 S. Ct. 1325, which involved restraint by an injunction Mr. Justice Frankfurter said in the prevailing opinion:

> "* * * In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' Id. 283 U. S. at 716. And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. *Alberts* v. *California*, decided this day [1 L. 2d 1498]. The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of § 22-a. [New York Code of Criminal Procedure.]
>
> "We need not linger over the suggestion that something can be drawn out of the Due Process Clause of

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[1] *U. S.* vs. *Keller* D. C. Pa. 158 F. Supp. 940, 943.
U. S. v. *One Book Entitled "Ulysses"* by James Joyce C. C. A. N. Y. 72 F. 2d 705, 707.
Duncan vs. *U. S.*, C. C. A. Or. 48 F. 2d 128, 132.
Swearingen v. *United States* 161 U. S. 446, 451.

the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. * * * Just as *Near* v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625, *supra*, one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that 'Liberty of speech, and of the press, is also not an absolute right,' 283 U. S. at 708, it likewise made clear that '*the protection even as to previous restraint is not absolutely unlimited.*' Id. 283 U. S. at 716. To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship. (Emphasis supplied)

"The judicial angle of vision in testing the validity of a statute like § 22-a is 'the operation and effect of the statute in substance.' Id. 283 U. S. at 713. The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539. * * *"

This Court has recognized the power of the State by the exertion of its police power to suppress obscenity.

"There are certain well defined and narrowly limited classes of speech *the prevention and punishment* of which *have never been thought* to raise any constitutional problem." [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571, 572, 86 L. Ed. 1031, 1035.]

"In maintaining this guaranty [liberty of the press and speech], the authority of the State to enact laws to promote the health, safety, *morals* and general wel-

> fare of its people is necessarily admitted." (*Near* v. *Minnesota*, 283 U. S. 697, 707, 51 S. Ct. 625, 628) (Emphasis added.)

In upholding the constitutionality of the licensing statute, the New York Court of Appeals reaffirmed the State's "primary responsibility for the preservation of the basic morality of its people." The Court of Appeals refused "to confer a license to corrupt."

The basic morality of the people of this State is well known. The appellant had ample knowledge of the moral code which it seeks to ridicule and debase. Adultery is the sole ground for divorce in New York State [Civ. Prac. Act §1147]; adultery is a crime in New York as in many states of the Union [Penal Law § 101]. As stated by Judge Conway in the opinion in the present case: "Indeed adultery has been decreed to be immoral since Moses received the Commandments on Mount Sinai."

The legislature in tying immorality in this part of the definition to sexual immorality sets up a clear standard and unless it is expected that the legislature describe all acts of sexual immorality in so many words, there can be no clearer statement than the expression used.

In *Roth* vs. *United States*, 354 U. S. 476, in upholding the power of the State to control obscenity, this Court pointed out that the erection of rigid definitions is an impossible task. Mr. Justice Brennan, when speaking for the Court in the Roth case, said:

> "This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice * * *'."

It cannot be debated and as a matter of fact we think it is practically conceded by the appellants here that this picture does contravene the part of the definition which prohibits the exhibition in New York State of motion pictures which portray sexual immorality as a desirable pattern of life. We make no attempt to debate here concerning adultery as such. That adultery is sexually immoral goes without question. That adultery is not an acceptable pattern of behavior is so universally held in almost every country of the world that we regard it unnecessary to belabor it. Furthermore, the statutory prohibition upon the exhibition of pictures in the language set forth here relative to adultery is so clear and specific that it is not subject to argument.

It is much plainer and more unambiguous than any language we can develop to attempt to establish such fact. Therefore, our position in this case is, as indicated, a very simple one. Factually, the picture shows scenes which are sexually immoral and as such obscene. The picture in its entirety presents adultery in a manner contrary to the express and unambiguous terms of the statute. The Motion Picture Division and the Board of Regents have no option but to certify to the people of the State that the exhibition of this picture is in violation of express and definitive provisions of the statute. It is the Legislature which prohibits the exhibition of this picture; not the Motion Picture Division nor the Regents. If the Legislature is without power, constitution-wise, to prevent the exhibition of pictures for the specific reasons which they have given, that, of course, is one thing. It is our clear understanding, however, that this Court has already settled this matter and concluded that the states are not without power to regulate to prescribe standards in these areas.

Appellant argues that criminal prosecution is available to punish the showing of an obscene film. Yet if he is successful in compelling the Regents to license a film its obscenity can never be attacked in a criminal proceeding in New York State because Section 1141 of the Penal Law expressly exempts from such criminal prosecution a motion picture which has a license from the Department (N. Y. State Penal Law, Section 1141, Subd. 1).

POINT II

This Court has already defined the permissible area of regulation of motion pictures and New York State is acting within such area.

While we fully realize that the briefs of the appellant in this case have again presented arguments concerning the application of the First and Fourteenth Amendments to the United States Constitution to motion pictures we see no useful purpose to be gained in going into the application of these principles again. We believe the Court has these issues in mind; that the Court has determined that the rights guaranteed thereby are not infringed, by a state insisting that before motion pictures are presented in theatres for pay they not be immoral. We do not think that the statute doing just this violates either the State or the Federal Constitutions. We see no further point in expanding these principles.

Judge Conway of the Court of Appeals presents to this Court a scholarly and most carefully thought-out opinion which goes into these matters fully. A great deal of research was made and the authorities fully explored. We do not think that exemplification on our part can add anything to that decision. We rest squarely on it.

Conclusion

In conclusion we are sure that the Court recognizes that the Board of Regents of New York State in administering the Motion Picture Law is endeavoring to carry out its statutory duties as laid down in law. When the administration of such law was assigned to the Department in 1927 the Regents were dubious as to the need for review of motion pictures by an administrative educational agency. In order to understand the complexities of a matter as important and far-reaching as this, one has to live with it. A stranger casually examining the problem without background is in no position to pass lightly on the matter. So after the Regents became experienced with the issues and noting the many types of pictures which clearly needed regulation, they changed their viewpoint entirely and concluded that the public interest was without question best served by a regulatory statute of this type. The members of the Board of Regents are as will be noted lawyers, doctors, farmers, bankers, brokers—in fact, are drawn from all walks of life although curiously enough, there has never been a clergyman serving on the board—at least during the administration of this Motion Picture Law. They are not professional educators nor moralists. They represent the thinking of a cross-section of the people of the State and their experienced opinion in respect to a matter of this type under these circumstances should be entitled to a great deal of weight.

It must be evident to this Court that there should be a clear breaking point between the limits of free speech and free publication and the point where the exploitations of these great freedoms injure and destroy the real precious heritage of the people, which is their own right to live amid moral and decent surroundings. In other words there is a

freedom which the Constitution certainly gives to people to have themselves and their children protected against exploitations of this nature. Perhaps there are some areas where certain exploitations do not ever reach the point where they are injurious. It would seem as though the Legislature of the State in setting up standards could explicitly deal with sexual immorality and prohibit unlawful exhibition of the same.

The difference between this case and all the others that have been presented to this Court it seems to us, rests at this level. The Legislature and the People of the State are quite familiar with the Court's position in the *Burstyn* case. The Legislature unanimously and with no objection of the people of the State and actually with their full approbation in the light of the *Burstyn* case, instructed the Regents to refuse to license pictures which dealt with sexual immorality. The Legislature could have left this work to the Courts. For the many reasons which have already been cited to this Court the people of the State concluded that the best way to handle the situation was to place in the hands of a body of the type represented by the Board of Regents this responsibility. The Legislature provided that such board action could be fully reviewed by the courts and if the Regents become arbitrary this is a complete remedy. It would seem that it should be left to the people of the State of New York to have the right to determine the *method* of the handling of a situation of this type. We can assure the Court that over the many years during which the regents have exercised this responsibility they have received nothing but praise from the people. The only ones who have complained are those who wish to present salacious material to the public for golden shekels. Everybody is familiar with the type of story this picture presents. Everybody knows that the original version was not permitted to

be brought into the United States. Everybody knows that the depicting of this story in the flesh is a more vivid, much stronger and franker presentation than the printed page. Certainly many of the scenes as depicted are as close to indecency, obscenity and immorality as such as one can get without portraying the specific acts of sexual intercourse. If the only restriction that is possible relates to the latter, than there is nothing wrong with this picture. Otherwise this picture is bad.

It would seem that where the Legislature and the people of this State as a matter of policy seek to find a way to preserve freedom from exploitation of filth that the usual rules of presumption of validity of their legislative acts should be given great weight by this Court.

Therefore, the decision of the New York Court of Appeals, upholding the constitutionality of the State system of licensing motion pictures, should be affirmed.

Respectfully submitted,

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APPENDIX

THE STATUTES INVOLVED

Education Law—Article 3

Part II—Motion Picture Division

§ 120. *Motion picture division continued; organization.* There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

§ 122. *Licenses.* The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a writ-

ten report of the reasons for his refusal and a description of each rejected part of a film not rejected *in toto*.

§ 122-a. *Definitions.* 1. For the purpose of section one hundred twenty-two of this chapter, the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

2. For the purpose of section one hundred twenty-two of this chapter, the term "incite to crime" shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

§ 123. *Permits.* 1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

*§ 2. *Scientific and educational films.* Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative,

*So in original. [Section symbol probably should be omitted.]

shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

§ 124. *Review by regents.* An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act at the instance of the applicant.

§ 125. *Permits revocable.* Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such

director or authorized officer only in the manner provided for license.

§ 126. *Fees.* The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

§ 129. *Unlawful use or exhibition.* It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

§ 130. *Posters, banners, et cetera.* No person or corporation shall exhibit or offer to another for exhibition pur-

poses any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department.

§ 131. *Penalty.* A violation of any provision of part two of this article shall be a misdemeanor.

§ 132. *Enforcement; rules and regulations.* The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.